UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CANON U.S.A., INC. and CANON FINANCIAL SERVICES, INC.,

Plaintiffs,

-against-

DIVINIUM TECHNOLOGIES, INC., formerly known as EZ DOCS, INC. d/b/a OFFICE AUTOMATION SYSTEMS and d/b/a VISTA DIGITAL SOLUTIONS, ANTHONY J. GRIMALDI, STEVEN HERNANDEZ, CATHERINE MATTIUCCI, LEONARD J. HARAC, JAY J. FREIREICH and BRACH EICHLER LLC,

Defendants.

Case No. 15-cv-01804-PAC

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR LEAVE TO AMEND COMPLAINT TO ASSERT CLAIM ON BEHALF OF CANON USA AGAINST DEFENDANTS JAY J. FREIREICH AND BRACH EICHLER LLC FOR VIOLATION OF NEW YORK JUDICIARY LAW § 487

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

BACKGROUND 3

I. Canon USA's Termination of EZ Docs' Dealership Because of EZ Docs' Fraud 4

II. The Termination Lawsuit 4

III. Documentary Evidence Establishing the Attorney Defendants' Section 487 Liability 6

A. The December 2008 Documents 7

B. The Conflict Waiver 8

C. The Nominee Declaration 8

D. Mattiucci's Malpractice Suit Against the Attorney Defendants 9

ARGUMENT 11

I. The Amendment Would Not Be Futile 12

A. The Section 487 Claim States a Cause of Action 13

B. The Section 487 Claim Is Properly Asserted in This Action 14

II. There Is No Undue Delay, Bad Faith, or Dilatory Motive 16

III. The Amendment Would Not Prejudice the Attorney Defendants 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

A.V. by Versace, Inc. v. Gianni Versace, S.p.A.,
87 F. Supp. 2d 281 (S.D.N.Y. 2000)....................18

Amalfitano v. Rosenberg,
12 N.Y.3d 8 (2009)....................1, 15

Amalfitano v. Rosenberg,
533 F.3d 117 (2d Cir. 2008)....................13

Chavis v. Chappius,
618 F.3d 162 (2d Cir. 2010)....................12

Chen v. Good Chows Inc.,
No. 14cv5960-FM, 2016 U.S. Dist. LEXIS 61691 (S.D.N.Y. May 3, 2016)....................18

Chevron Corp. v. Donziger,
871 F. Supp. 2d 229 (S.D.N.Y. 2012)....................15

Dupree v. Voorhees,
24 Misc. 3d 396, 876 N.Y.S.2d 840 (Sup. Ct. Suffolk Co.), *aff'd as modified*,
68 A.D.3d 810, 891 N.Y.S.2d 422 (2d Dep't 2009)....................15

Flood v. Carlson Rests. Inc.,
2016 U.S. Dist. LEXIS 75393 (S.D.N.Y. June 7, 2016)....................17

Holmes v. Grubman,
568 F.3d 329 (2d Cir. 2009)....................12

Melcher v. Greenberg Traurig LLP,
135 A.D.3d 547 (1st Dep't 2016)....................13, 14, 15

Monahan v. N.Y.C. Dep't of Corrs.,
214 F.3d 275 (2d Cir. 2000)....................12, 16

Olshansky v. Sutton,
00 Civ. 3539 (LAP), 2001 U.S. Dist. LEXIS 945 (S.D.N.Y. Feb. 6, 2001)....................13

Specialized Indus. Servs. Corp. v. Carter,
68 A.D.3d 750 (2d Dep't 2009)....................16

Trepel v. Dippold,
2005 U.S. Dist. LEXIS 8541 (S.D.N.Y. May 9, 2005)....................13

Williams v. Koenigsmann,
No. 14-CV-2498 (NSR)(LMS), 2016 U.S. Dist. LEXIS 75953 (S.D.N.Y. June 10, 2016) 12, 17

Yalkowsky v. Century Apartments Assocs.,
215 A.D.2d 214 (1st Dep't 1995) 14, 15

Statutes

CPLR 5015....................14

Fed. R. Civ. P. 8....................13

Fed. R. Civ. P. 15(a) .... *passim*

Fed. R. Civ. P. 16(b) 12

N.Y. Judiciary Law § 487 .... *passim*

Plaintiffs Canon U.S.A., Inc. ("Canon USA") and Canon Financial Services, Inc. ("CFS") (together, "Canon") respectfully submit this memorandum in support of their motion, pursuant to Fed. R. Civ. P. 15(a)(2), for leave to amend their Complaint to assert a claim on behalf of Canon USA against defendants Jay J. Freireich ("Freireich") and his law firm, Brach Eichler LLC ("Brach Eichler") (collectively, the "Attorney Defendants"), for violation of New York Judiciary Law § 487 ("Section 487").[1]

PRELIMINARY STATEMENT

As stated by the New York Court of Appeals, the "evident intent" of Section 487 is "to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function." *Amalfitano v. Rosenberg*, 12 N.Y.3d 8, 14 (2009). Document discovery in this action has confirmed beyond legitimate dispute that the Attorney Defendants violated Section 487. They did so by commencing and prosecuting an action on behalf of their clients against Canon USA in New York state court that was based upon material allegations – in a complaint and accompanying application seeking injunctive relief – which they knew to be false.

The Attorney Defendants drafted and filed these false submissions in an attempt to deceive the state court into reinstating their clients' terminated authorized Canon business equipment retail dealership. The Attorney Defendants knew that certain assertions of fact made to the court were false, because they had prepared the very documents that enabled their former clients to defraud Canon USA into appointing them an authorized dealer in the first place.

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[1] A clean copy of the proposed Amended Complaint ("AC") is annexed as Exhibit A to the accompanying Declaration of Richard H. Silberberg, dated July 8, 2016 ("Silberberg Decl."). A copy of the AC, marked against the current Complaint to reflect modifications, is annexed to the Silberberg Decl. as Exhibit B. In addition to asserting a new cause of action against the Attorney Defendants for violation of Section 487, the AC also contains (i) allegations concerning new evidence of the Section 487 violation recently produced in this action, (ii) revisions to terminology for the purpose of consistency, and (iii) refinements of certain allegations, made with the benefit of document discovery conducted to date.

The Complaint in this case charges the Attorney Defendants with aiding and abetting their clients' fraud and seeks to recover the resultant damages suffered by Canon. The proposed Section 487 claim serves a different function. By making knowingly false assertions to attempt to deceive the state court, the Attorney Defendants acted in complete derogation of their special obligations as officers of the court. The private right of action conferred by Section 487 enables Canon USA and this Court to hold the Attorney Defendants accountable for that deception.

There is no legitimate basis for the Attorney Defendants' opposition to Canon's application for leave to amend. The facts substantiating the Section 487 claim are overwhelming, which may explain why, during pre-motion discussions and proceedings (and otherwise throughout this action), the Attorney Defendants have said little, if anything, to challenge the substance of the claim or to defend their conduct.

Moreover, the Attorney Defendants would suffer no prejudice if leave to amend were granted at this juncture. The Section 487 claim parallels the aiding and abetting allegations already contained in the current Complaint, of which the Attorney Defendants have been on notice since the inception of this action. No depositions have yet been conducted in this action, and no additional discovery would be needed as a result of amendment.

Furthermore, Canon USA's proposed amendment is sought in good faith. In light of the serious legal consequences associated with Section 487 violations, Canon USA only sought leave to amend after giving the Attorney Defendants the opportunity, through document discovery, to disabuse Canon USA of the notion that they had deliberately sought to mislead the state court. But, regrettably, the Attorney Defendants have produced virtually no relevant material concerning the state court action (raising serious questions regarding their compliance with their discovery obligations), and documents recently produced by a co-defendant only further confirm the scope of the Attorney Defendants' deception.

BACKGROUND

The claims currently asserted against the Attorney Defendants in this action concern their aiding and abetting of pervasive fraud perpetrated by their former clients – EZ Docs, Inc. ("EZ Docs"), an entity operated as a criminal enterprise, and its principals, Anthony Grimaldi ("Grimaldi") and Steven Hernandez ("Hernandez") – against Canon, end-users of Canon-brand business equipment, and others.

As this Court held in compelling the production of documents that had been withheld by the Attorney Defendants on the basis of privilege, "there is evidence that Grimaldi and Hernandez sought legal advice from the attorney defendants in incorporating and organizing EZ Docs so that they could execute their fraudulent schemes." ECF No. 80 at 2. The Court further found that "there is probable cause to believe that EZ Docs's entire business was fraud, so any legal services rendered to EZ Docs were 'in furtherance' of the fraud." *Id.*

The Complaint details the manner in which Canon USA was defrauded into appointing EZ Docs as an authorized Canon dealer, and how EZ Docs then used that status to defraud large numbers of end-user customers and leasing companies (including CFS). *See* ECF No. 1 §§ II(IV)(A)-(F). The Complaint also describes how the Attorney Defendants facilitated the fraud by organizing and structuring EZ Docs to intentionally conceal the identities of its true owners and principals, Grimaldi and Hernandez, because, as the Attorney Defendants well knew, Canon USA had refused to countenance Grimaldi's and Hernandez's ownership and control of an authorized Canon dealership. *See id.* §§ (IV)(D)-(E). Indeed, at least one of the agreements that the Attorney Defendants prepared in order to mislead Canon USA contains an unequivocal recital that the corporate structure devised by the Attorney Defendants was implemented for the very purpose of concealing Grimaldi's and Hernandez's ownership and control of EZ Docs from Canon USA. *See id.* ¶ 161.

Canon USA's proposed Section 487 claim is based upon a discrete aspect of the Attorney Defendants' complicity in EZ Docs' fraud. Specifically, the Section 487 claim concerns material misrepresentations underlying the lawsuit commenced in November 2011 by EZ Docs against Canon USA in New York County Supreme Court, in which EZ Docs unsuccessfully contested Canon USA's October 2011 termination of EZ Docs' authorized Canon dealership (the "Termination Lawsuit").

I. Canon USA's Termination of EZ Docs' Dealership Because of EZ Docs' Fraud

By letter dated October 25, 2011, Canon USA notified EZ Docs that it was terminating EZ Docs' authorized Canon dealership, effective immediately. Among the grounds cited by Canon USA were that:

- "EZ Docs was created as a means for Messrs. Grimaldi and Hernandez to deceive Canon USA and obtain an authorized Canon retail dealership;"
- "The deception perpetrated by Messrs. Hernandez and Grimaldi, and their involvement in senior management roles at EZ Docs is, in and of itself, sufficient to justify Canon USA's determination that EZ Docs cannot be trusted to perform its dealership responsibilities in a responsible and ethical manner;" and
- "Canon USA does not wish to continue to do business with an authorized retail dealer employing such persons in senior management positions."[2]

II. The Termination Lawsuit

In response to Canon USA's termination letter, EZ Docs, represented by the Attorney Defendants, filed suit in New York County Supreme Court and immediately moved for a preliminary injunction reinstating EZ Docs' dealership. The papers drafted and filed by the Attorney Defendants contended that Canon USA's "purported termination of [EZ Docs' dealership], upon the various grounds stated in their termination letter . . . constituted a breach of the Agreement."[3]

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[2] *See* Silberberg Decl. ¶ 4, Ex. C.

To rebut Canon USA's assertion that the termination was justified by the deception of Canon USA concerning Grimaldi and Hernandez's ownership and control of EZ Docs, the Attorney Defendants prepared and filed a Complaint, an Affidavit of Catherine Mattiucci (the "Mattiucci Affidavit"), and a memorandum of law asserting, *inter alia*, that:

1. Catherine Mattiucci ("Mattiucci"), who is Grimaldi's sister, was the "sole owner holding 100% of the shares" of EZ Docs and "[n]o other person ha[d] ever held any equity interest" in EZ Docs;
2. Mattiucci was the "sole officer" of EZ Docs;
3. "While [Canon USA] also stated (referring to Anthony Grimaldi and Steven Hernandez) that 'Canon USA does not wish to continue to do business with an authorized retail dealer employing such persons in Senior Management positions,' neither Anthony Grimaldi nor ex-employee Steven Hernandez were ever in Senior Management positions with [EZ Docs]" and Canon USA's assertion was "untrue;"
4. Grimaldi and Hernandez played supporting "sales" and "office operations" roles at EZ Docs, and they only performed management functions to assist Mattiucci "due to the strains of [Mattiucci's daughter's] illness;" and
5. There was "no deception" of Canon USA.[4]

These assertions were made to convey the illusion that Mattiucci was EZ Docs' sole owner and principal, for the purpose of rebutting Canon USA's termination of EZ Docs' authorized Canon dealership on the basis that Canon USA had been deceived regarding EZ Docs' ownership and control. In truth, however, as the Attorney Defendants not only knew, but orchestrated, Mattiucci was a mere puppet of Grimaldi and Hernandez, and EZ Docs was controlled at all times by Grimaldi and Hernandez.[5] As discussed below, the Attorney Defendants drafted a series of documents (all prepared and executed well before the

[3] *See* Silberberg Decl. ¶ 5, Ex. D ¶ 18.
[4] *See id.*, Ex D. ¶¶ 15-18; Ex. E ¶¶ 1-2, 22, 24-26, 29-30; Ex. F at 7.
[5] The Attorney Defendants' deceit in the Termination Lawsuit was unsuccessful. In denying the Attorney Defendants' application for injunctive relief, the state court found that "it just doesn't pass the smell test for me." *See id.* ¶ 6, Ex. G at 31:10-11.

commencement of the Termination Lawsuit in November 2011) whose purpose was to facilitate the deception of Canon USA. Such documents flatly contradict the assertions made to deceive the state court, as they concede the following facts:

1. EZ Docs was formerly known as Office Automation Systems, the stock of which was "originally capitalized" by Grimaldi and Hernandez, who, after the name change, held options to purchase the stock from Mattiucci for a *de minimis* sum and later obtained the right to procure the stock upon request;
2. Grimaldi and Hernandez were EZ Docs' "de facto shareholders, officers and directors;"
3. Not only were Grimaldi and Hernandez formally designated by their employment agreements as EZ Docs management "responsible for the day to day management" and "day to day management decisions," but they fully indemnified Mattiucci for her role as their "nominee;"
4. Grimaldi and Hernandez were "in control of" EZ Docs; and
5. The Attorney Defendants deceptively structured EZ Docs "so that EZ Docs could conduct business with Canon," which was "unwilling to permit [Grimaldi and Hernandez] to have any ownership interest in a Canon licensed dealership."[6]

III. Documentary Evidence Establishing the Attorney Defendants' Section 487 Liability

In August 2012, Canon USA came into possession of certain documents revealing that the Attorney Defendants were intimately involved in deceiving Canon USA regarding EZ Docs' ownership and control. Until then, Canon USA had no evidence substantiating that the Attorney Defendants were complicit in EZ Docs' fraud. Canon USA has subsequently obtained additional documents (some produced by defendant Leonard Harac as recently as June 16, 2016) further evidencing the Attorney Defendants' aiding and abetting of their clients' fraud.[7]

Select documents substantiating the Attorney Defendants' wrongdoing are discussed below. They unequivocally show that the Attorney Defendants colluded with their clients to

[6] The quoted documents are specified in Section III, *infra*.

[7] *See* Silberberg Decl. ¶ 7.

suborn perjury, knowingly convey blatant falsehoods, and shamelessly capitalize on the grave illness of Mattiucci's daughter in an attempt to deceive the state court and Canon USA.

A. The December 2008 Documents

The earliest incriminating documents now in Canon USA's possession were executed in December 2008, after Grimaldi and Hernandez had retained attorney Freireich to provide legal services.[8] At that time, Freireich was aware that Grimaldi and Hernandez were the true owners and principals of EZ Docs, but that Mattiucci had to be so designated to deceive Canon USA regarding the company's ownership and control. Freireich prepared a series of documents whose sole purpose was to facilitate his then clients' perpetration of fraud upon Canon USA. Such documents included:[9]

1. The Option to Purchase Stock Agreement

Pursuant to the Option to Purchase Stock Agreement prepared by Freireich, Mattiucci was designated as the nominal owner of 100% of EZ Docs' stock to hide the identities of the real owners. Grimaldi and Hernandez were granted options to purchase the stock for a *de minimis* sum of $10,000.[10]

2. The Employment Agreements

Freireich prepared employment agreements for Grimaldi's and Hernandez's employment by EZ Docs. Both agreements provided that:

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[8] Although the Attorney Defendants have represented to the Court that Freireich was "not retained by Grimaldi, Hernandez and Mattiucci in regards to EZ Docs until December 4, 2008" (*see* ECF No. 72 at 3), it is clear from the numerous documents executed on December 4, 2008 that Freireich had already been retained by that date. Indeed, defendant Harac has asserted in his pleading that Freireich was retained by Grimaldi and Hernandez at least several months prior to that date (*see* ECF No. 75-1), which is substantiated by documents produced by the Attorney Defendants – including EZ Docs' Certificate of Incorporation, signed by Freireich on September 26, 2008. *See* Silberberg Decl. ¶ 8, Ex. H.

[9] In addition to the documents described in this memorandum, Canon USA is aware that Freireich also prepared the following documents dated December 4, 2008: (1) Asset Purchase Agreement, (2) Promissory Note, (3) Security Agreement, (4) Stock Subscription Agreement, and (5) Escrow Agreement. *See id.* ¶ 7.

[10] *See id*. ¶ 9, Ex. I.

> During the period of employment hereunder, ***the Employee shall serve as a Manager*** of the Employer and shall devote such full time and effort to the business and affairs of the Employer as shall be necessary. ***Employer shall be responsible for the day to day management and make day to day management decisions***. The Employee shall use his best efforts to promote the interests of the Employer and shall assist in the operations of the Employer in all respects. (Emphasis supplied.)[11]

3. The Indemnification Agreement

Freireich prepared a tri-partite Indemnification Agreement by which Grimaldi and Hernandez indemnified Mattiucci for her nominal role as the "record owner" of EZ Docs. That agreement specifically stated that Grimaldi and Hernandez "***will be in control***" of EZ Docs "through stock proxy and employment control" (emphasis supplied).[12]

B. The Conflict Waiver

In July 2011, Freireich prepared a letter containing a conflict of interest waiver for his joint representation of EZ Docs, Grimaldi, Hernandez, and Mattiucci (the "Conflict Waiver"). The Conflict Waiver, signed by Freireich and composed on Brach Eichler's letterhead, recited that Grimaldi and Hernandez were EZ Docs' "***de facto shareholders, officers and directors***" (emphasis supplied).[13]

C. The Nominee Declaration

For reasons presumably related to Mattiucci's potential exposure to personal liability arising from an ever-increasing number of customer complaints and lawsuits filed against EZ Docs, Grimaldi and Hernandez apparently sought Freireich's assistance during the second half of 2011 in creating a further agreement that would indemnify Mattiucci against such personal liability, so that she would not back out of playing her role as EZ Docs' puppet owner and principal.

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[11] *See* Silberberg Decl. ¶ 10, Exs. J and K.
[12] *See id.* ¶ 11, Ex. L.
[13] *See id.* ¶ 13, Ex. M.

Freireich prepared another tri-partite agreement amongst Grimaldi, Hernandez, and Mattiucci, entitled "Nominee Declaration," which was executed in early October 2011 (*i.e.*, prior to Canon USA's notice to EZ Docs that it was terminating EZ Docs' authorized Canon dealership). That agreement (i) recited that EZ Docs' stock "***was originally capitalized by***" Grimaldi and Hernandez; (ii) acknowledged that "***Canon was and is unwilling to permit [Grimaldi and Hernandez] to have an ownership interest in a Canon licensed dealership***;" (iii) further acknowledged that Grimaldi and Hernandez were "intended" to be co-owners of EZ Docs; (iv) recited that Mattiucci "***has acted as nominee for [Grimaldi] and [Hernandez]***" in holding ownership of EZ Docs' stock; and, in light of the foregoing, (v) provided that Grimaldi and Hernandez would ***indemnify Mattiucci*** for any liability arising from their conduct; and (vi) further provided that in exchange for such indemnification, Mattiucci would transfer ownership of Grimaldi's and/or Hernandez's shares of EZ Docs' stock to them at any time, "***if and when requested***" (emphasis supplied).[14]

D. Mattiucci's Malpractice Suit Against the Attorney Defendants

In March 2014, Mattiucci sued the Attorney Defendants in New York County Supreme Court for legal malpractice. Mattiucci's complaint admitted that she and others conspired to defraud Canon USA regarding EZ Docs' ownership and control, and included the July 2011 Conflict Waiver as an exhibit. Mattiucci further asserted that, while ostensibly serving as her counsel (as well as counsel to Grimaldi, Hernandez, and EZ Docs), the Attorney Defendants compromised her interests in favor of the interests of Grimaldi and Hernandez.[15]

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[14] *See* Silberberg Decl. ¶ 14, Ex. N.

The Attorney Defendants successfully moved to dismiss Mattiucci's malpractice suit on the basis of the Conflict Waiver that Mattiucci had signed. In doing so, the Attorney Defendants essentially admitted to having structured EZ Docs' ownership for the purpose of deceiving Canon USA. For example, the attorney affirmation and brief filed in support of the Attorney Defendants' motion to dismiss (submitted by the same counsel representing the Attorney Defendants in this action) explicitly admit, *inter alia*, that "the Nominee Declaration is also clear in that plaintiff was acting as the nominee for Grimaldi and Hernandez so that EZ Docs could conduct business with Canon."[16]

In granting the Attorney Defendants' motion to dismiss, Justice Nancy M. Bannon referenced the Attorney Defendants' admission, and noted that the allegations in Mattiucci's complaint pointed to the existence of a conspiracy to defraud Canon USA in which the Attorney Defendants participated:

> The parties acknowledge that Canon was unwilling to permit Grimaldi or Hernandez to have any ownership interest in a Canon licensed dealership due to their criminal records. Therefore, defendant Freireich prepared an Option to Purchase Stock Agreement which provided that plaintiff owned 100% of the common stock of EZ Docs, and granted the exclusive option to Grimaldi and Hernandez to purchase all of EZ Docs' stock for $10,000 . . . Defendant Freireich then prepared a Nominee Declaration which provided that the plaintiff acted as nominee for Grimaldi and Hernandez because Canon was not willing to grant any ownership interest in a Canon licensed dealership to Grimaldi or Hernandez . . . Finally, an "applicable principle in this case is that a [party] cannot benefit from [her] own wrongdoing." *Zumpano v Quinn*, 6 NY3d 666, 685 (2006). The plaintiff knowingly participated in a scheme to acquire a business with her brother and friend and then, when the arrangement she agreed to resulted, not unexpectedly, in her being named as a defendant in legal actions against the company and being ousted by her partners, turned to her attorneys for relief by

[15] *See* Silberberg Decl. ¶ 12.
[16] *See* Silberberg Decl. ¶ 15, Ex. O ¶ 15.

> claiming they committed malpractice by allowing her to participate in that arrangement, notwithstanding her signed waivers. To allow the action to proceed would be to countenance this scheme, and the court declines to do so.[17]

The foregoing evidence establishes that the Attorney Defendants were fully cognizant of Grimaldi and Hernandez's roles as EZ Docs' "de facto shareholders, officers and directors," yet represented to the state court in the Termination Lawsuit that they had no ownership interest in or control of the company and had only taken on significant managerial responsibilities to support Mattiucci during her child's illness. Canon propounded numerous document requests to the Attorney Defendants in this action regarding the Termination Lawsuit to determine whether an alternate explanation may exist for what otherwise appeared to be their brazen subornation of perjury and deliberate misrepresentations to the state court.[18] Having received no such explanation,[19] Canon USA now seeks to hold the Attorney Defendants liable for their deceit under a New York statute expressly intended for that purpose.

ARGUMENT

A motion for leave to amend is governed by Fed. R. Civ. P. 15(a)(2), which provides that courts "should freely give leave when justice so requires." Rule 15(a) embodies a liberal approach to the allowance of amendments. As the Second Circuit has stated:

> The Rule reflects two of the most important principles behind the Federal Rules: pleadings are to serve the limited role of providing the opposing party with notice of the claim or defense to be litigated, and "mere technicalities" should not prevent cases from being decided on the merits. Thus, absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility, Rule 15's mandate must be obeyed.

See Monahan v. N.Y.C. Dep't of Corrs., 214 F.3d 275, 283 (2d Cir. 2000) (internal citations and quotation omitted); *see also Chavis v. Chappius*, 618 F.3d 162, 171 (2d Cir. 2010) (a "motion to amend is generally denied only for futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party") (quotation omitted).[20]

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[17] *See id.* ¶ 16, Ex. P.
[18] *See* Silberberg Decl. ¶ 17.
[19] *See id*.

As set forth below, justice requires that the Attorney Defendants be held accountable for their deceptive conduct and affront to the integrity of the courts. Canon USA's proposed amendment is well substantiated, made in good faith, and would not cause any delay or prejudice. Leave to amend should therefore be granted.

I. The Amendment Would Not Be Futile

Pursuant to Fed. R. Civ. P. 15(a), "[l]eave to amend may be denied 'on grounds of futility if the proposed amendment fails to state a legally cognizable claim or fails to raise triable issues of fact.'" *Williams v. Koenigsmann*, No. 14-CV-2498 (NSR)(LMS), 2016 U.S. Dist. LEXIS 75953, at *4-5 (S.D.N.Y. June 10, 2016) (quoting *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 726 (2d Cir. 2010)). "A proposed amendment is futile if it 'could not withstand a motion to dismiss pursuant to [Rule] 12(b)(6).'" *Id.* (quoting *Lucente v. Int'l Bus. Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002)).

Thus, as on a motion to dismiss, "the court must 'accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff.'" *Trepel v. Dippold*, 2005 U.S. Dist. LEXIS 8541, at *9 (S.D.N.Y. May 9, 2005)

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[20] Canon USA notes that where an operative scheduling order's deadline to amend pleadings has passed, "the lenient standard under Rule 15(a), providing that leave to amend 'shall be freely given,' must be balanced against the requirement under Rule 16(b) that the Court's scheduling order 'shall not be modified except upon a showing of good cause.'" *Holmes v. Grubman*, 568 F.3d 329, 334-35 (2d Cir. 2009) (quotation omitted). In this action, neither the September 3, 2015 Civil Case Management Plan and Scheduling and Order nor the January 5, 2016 Revised Civil Case Management Plan contains a deadline to amend pleadings. Instead, they provide that "[a]mended pleadings may not be filed and additional parties may not be joined except with leave of the Court." *See* ECF No. 39 § 3; ECF No. 61 § 3. Accordingly, Canon USA's proposed amendment would not require a modification of the scheduling order, and the "good cause" requirement of Fed. R. Civ. P. 16(b) does not apply. Nevertheless, even if the "good cause" requirement did apply, Canon USA has established good cause by diligently seeking amendment in a manner that would not cause the Attorney Defendants any prejudice.

(quoting *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997)). Section 487 claims are subject to Fed. R. Civ. P. 8's notice pleading standard. *See id.* (holding that plaintiff stated a claim under Section 487); *Olshansky v. Sutton*, 00 Civ. 3539 (LAP), 2001 U.S. Dist. LEXIS 945, at *13 (S.D.N.Y. Feb. 6, 2001) ("Under the liberal pleading standards of Rule 8, plaintiff has adequately alleged a claim under New York Judiciary Law § 487").

A. The Section 487 Claim States a Cause of Action

Section 487 "permits a civil action to be maintained by any party who is injured by an attorney's intentional deceit or collusion in New York on a court or on any party to litigation, and it provides for treble damages." *Amalfitano v. Rosenberg*, 533 F.3d 117, 123 (2d Cir. 2008). "The act of deceit need not occur during a physical appearance in court; the statute applies to any oral or written statement related to a proceeding and communicated to a court or party with the intent to deceive." *Id.* "A single act or decision, if sufficiently egregious and accompanied by an intent to deceive, is sufficient to support liability." *Id.*

Moreover, "regardless of whether the attorney's deceit was successful," a "plaintiff in a section 487 case may recover the legal expenses incurred as a proximate result of a material misrepresentation in a prior action." *Melcher v. Greenberg Traurig LLP*, 135 A.D.3d 547, 552 (1st Dep't 2016) (citations omitted).

Here, the proposed Section 487 claim alleges that the Attorney Defendants colluded with their clients to deceive the state court and Canon USA in the Termination Lawsuit. The proposed amendment carefully details the deceptive statements drafted and submitted by the Attorney Defendants that provided the foundation for EZ Docs' claim in the Termination Lawsuit that Canon USA's grounds for termination were improper. The proposed amendment also describes the documentary evidence obtained to date proving that the Attorney Defendants knew their statements to the court were false. The proposed amendment further alleges that

Canon USA was proximately harmed by the Attorney Defendants' attempted deception because it was forced to incur legal expenses to defend against EZ Docs' frivolous claims. *See* AC ¶¶ 291-303.

B. The Section 487 Claim Is Properly Asserted in This Action

Under controlling law, a plaintiff may properly assert a Section 487 claim in a civil action that is brought subsequent to the underlying lawsuit in which the statutory violation occurred. Although authority exists that a Section 487 claim may only be asserted in the underlying lawsuit, that authority is limited to Section 487 claims which seek "to collaterally attack any prior adverse judgment or order on the ground that it was procured by fraud." *See Melcher,* 135 A.D.3d 547 at 554. For example, in *Yalkowsky v. Century Apartments Assocs*., 215 A.D.2d 214, 215 (1st Dep't 1995), the Appellate Division, First Department held that the "plaintiff's remedy lies exclusively" in the suit in which the defendant misled the court, as the plaintiff should have sought recourse "by moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the judgment in the original action."

However, where (as here), a plaintiff "seeks to recover lost time value of money and the excess legal expenses incurred . . . as a proximate result of defendants' alleged deceit," the plaintiff may seek redress by asserting a Section 487 claim "in a separate action under the Judiciary Law." *Melcher*, 135 A.D.3d 547 at 555. Moreover, a plaintiff may file a separate action regardless of whether the plaintiff knew of the Section 487 violation during the pendency of the underlying action. *See id.* (holding that plaintiff may bring separate action despite filing, in the underlying action, motion to strike pleadings and motion to disqualify counsel based upon the defendants' alleged fraud on the court).

Plaintiffs may pursue separate civil actions under Section 487 because, as the New York Court of Appeals has explicitly held, Section 487 claims are viable even if a defendant's deceit is unsuccessful and does not result in the fraudulent procurement of a judgment or order. *See Amalfitano*, 12 N.Y.3d at 14 ("to limit forfeiture under section 487 to successful deceits would run counter to the statute's evident intent to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function"); *see also*, *e.g.*, *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 261-62 (S.D.N.Y. 2012) (permitting Section 487 claim to proceed in separate lawsuit because it was not seeking to "collaterally attack the adverse judgment in a subsequent action under Section 487"); *Dupree v. Voorhees*, 24 Misc. 3d 396, 402, 876 N.Y.S.2d 840, 845 (Sup. Ct. Suffolk Co.), *aff'd as modified*, 68 A.D.3d 810, 891 N.Y.S.2d 422 (2d Dep't 2009) ("in view of *Amalfitano* a better reading of those Appellate Division cases," including *Yalkowsky*, *supra*, "would be that a plenary action under this section may not be commenced afterwards only if its essential purpose is to give that party a means to collaterally attack the judgment in the underlying action"). In addition, as the courts have noted, the language of Section 487 "does not require that the claim be asserted in the same action in which the violation occurred," and instead "simply provides that an attorney who has practiced a deception will be liable for treble damages 'to be recovered in a civil action.'" *Melcher*, 135 A.D.3d at 554.

Here, Canon USA does not seek to collaterally attack a prior adverse order or judgment.[21] Rather, it seeks recovery of legal fees incurred as a proximate result of the Attorney Defendants' collusion and deceit. Accordingly, Canon USA's Section 487 claim is properly asserted in this action, and was not required to be asserted in the Termination Lawsuit.

[21] The Attorney Defendants' deceit in the Termination Lawsuit was unsuccessful. *See* n. 5, *supra*.

Nevertheless, even if Canon USA were seeking to collaterally attack a prior adverse order or judgment (which it is not), its Section 487 claim would still be properly asserted in this action pursuant to the "greater fraud" doctrine. Under that doctrine, "a separate lawsuit may be brought where the alleged perjury or fraud in the underlying action was merely a means to the accomplishment of a larger fraudulent scheme which was greater in scope than the issues determined in the prior proceeding." *Specialized Indus. Servs. Corp. v. Carter*, 68 A.D.3d 750, 751-52 (2d Dep't 2009) (quotations omitted).

Here, the voluminous proposed Amended Complaint details how the Attorney Defendants' deceit in the Termination Lawsuit was part and parcel not only of a larger fraudulent scheme to defraud Canon USA regarding EZ Docs' ownership and control that stretched back to 2008, but also was undertaken to preserve and promote EZ Docs' overarching scheme to defraud end-user customers and leasing companies that was reliant upon EZ Docs' continued possession of its authorized Canon dealership. *See generally* ECF No. 1. The "greater fraud" doctrine therefore provides a separate and independent basis for the assertion of Canon USA's Section 487 claim against the Attorney Defendants in this action.

II. There Is No Undue Delay, Bad Faith, or Dilatory Motive

Fed. R. Civ. P. 15(a)'s liberal standard counsels against amendment where there is "evidence of undue delay, bad faith or dilatory motive on the part of the movant." *See Monahan v. N.Y.C. Dep't of Corrs.*, 214 F.3d 275, 283 (2d Cir. 2000). None of these factors is present here.

Given the serious legal consequences associated with Section 487 violations, Canon USA only sought leave to amend after providing the Attorney Defendants with the opportunity to produce documents justifying their actions in the Termination Lawsuit. The Attorney Defendants failed to produce any vindicating documents (indeed, virtually no internal documents at all relating to the Termination Lawsuit), and materials produced by defendant Leonard Harac just last month have provided further evidence of the Attorney Defendants' knowledge of their deception.[22] The instant motion is thus brought promptly after the Harac disclosures which, coupled with the Attorney Defendants' failure to produce any vindicating materials, confirm that there is no real defense to the Section 487 claim.[23] Finally, the amendment is sought before any depositions have been conducted in this action and would not require any separate discovery or an extension of the fact discovery deadline.[24]

III. The Amendment Would Not Prejudice the Attorney Defendants

Of the factors considered by courts under Fed. R. Civ. P. 15(a), prejudice is "perhaps most important." *See Williams*, 2016 U.S. Dist. LEXIS 75953, at *4 (quotation omitted). To assess prejudice, courts within the Second Circuit "must consider 'whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.'" *Flood v. Carlson Rests. Inc.*, 2016 U.S. Dist. LEXIS 75393, at *5 (S.D.N.Y. June 7, 2016) (quoting *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993)). Furthermore, "allegations of prejudice because of time, effort, or money expended in a case alone are insufficient to defeat a motion to amend." *See id.* at *5 (quotation omitted) (holding that proposed amendments that "do not substantially alter the scope of discovery" would not cause undue prejudice).

Courts therefore routinely allow leave to amend where amendments relate to subject matter in the operative pleadings, would not require "substantial" additional discovery, and would not cause "significant" undue delay. *See, e.g.*, *Chen v. Good Chows Inc.*, No. 14cv5960-FM, 2016 U.S. Dist. LEXIS 61691, at *6 (S.D.N.Y. May 3, 2016) (finding insufficient prejudice and granting leave to amend where "[t]he Defendants have not shown that the proposed amendments will require a significant amount of additional resources or significantly delay these proceedings," noting that "no new discovery will be necessary," and collecting cases); *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 87 F. Supp. 2d 281, 299 (S.D.N.Y. 2000) (finding insufficient prejudice and granting leave to amend complaint where discovery had not been completed and proposed claims did "not raise factual claims unrelated to the events in [the] original third-party complaint").

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[22] *See* Silberberg Decl. ¶¶ 7, 17.
[23] *See id.* ¶ 17.
[24] *See* Silberberg Decl. ¶ 18.

Here, the proposed Section 487 claim concerns the subject matter already present in the original Complaint. The Termination Lawsuit has already been the subject of document discovery.[25] And, as stated above, no depositions have occurred and the amendment would not require any additional, separate discovery. Accordingly, amendment plainly would not cause the Attorney Defendants any prejudice, let alone the requisite "undue prejudice" to overcome the liberal presumption in favor of amendment.

Moreover, if this motion to amend were denied, Canon USA would be entitled to commence a new and indisputably timely lawsuit against the Attorney Defendants for violating Section 487. As a related case, that action likely would be consolidated with this action. Accordingly, granting the motion to amend would be the most efficient means of accommodating Canon USA's intention to assert a Section 487 claim against the Attorney Defendants.

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[25] *See* Silberberg Decl. ¶ 17.

CONCLUSION

For the foregoing reasons, Canon respectfully requests that the Court grant its motion for leave to amend the Complaint to assert a cause of action on behalf of Canon USA against the Attorney Defendants for violation of Section 487.

Dated: New York, New York
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